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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1132

ALBRITTON ENGINEERING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–8a) is reported at 340 F. 2d 281. The Board's Decision and Order (R. 248–250, 164–255)[1] are reported at 138 NLRB 940.

JURISDICTION

The judgment of the court of appeals was rendered on January 11, 1965 (Pet. 9a), and its decree enforcing the Board's Order was entered on February 2, 1965 (Pet. 11a–13a). A timely petition for rehearing was denied on February 23, 1965 (Pet. 17a).

[1] "R." and "J.A." references are to the Transcript of Record and to the Joint Appendix in the court below.

The petition for a writ of certiorari was filed on May 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) of the National Labor Relations Act by denying reemployment to 19 strikers because they had participated in a strike against it.

2. Whether the complaint was barred by the limitations period contained in Section 10(b) of the Act.

3. Whether the General Counsel was empowered to grant the charging parties an extension of time to file a request for review of the Regional Director's refusal to issue a complaint.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act and the Board's Rules and Regulations are set forth at pages 19a–24a of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In August, 1959, following an election held pursuant to a consent agreement, the Union [2] was certified as bargaining representative for the employees at petitioner's two plants at Bryan, Texas (R. 166; J.A. 69–71). Bargaining negotiations began shortly there-

[2] Local 458, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO.

after and continued until an impasse was reached early in June, 1960 (R. 166; J.A. 71).

During the week of May 23, 1960, petitioner's president, Ford D. Albritton, Jr., learning that a strike had been authorized, called the employees of both plants together and spoke to them for half an hour. He told the employees that they had been "one big family" to him and that he wanted to keep it that way; that, under the Texas right-to-work law, they did not have to join any strike that might be called even if they were members of the Union; and that he would protect any employees who saw fit to work during a strike. Finally, Albritton warned the employees that if they walked out he would not take them back but that they would be replaced, as the Company had many applications from people who wished to work for it (R. 166–168; J.A. 126–127, 143–144, 179–180, 192–194, 206–207, 209, 220, 230–231, 239, 247, 253–254, 262–263, 267, 273–274, 288, 296–297, 317, 326–328, 335–336, 351).

The Union called a strike on June 13, 1960 (R. 168–169; J.A. 71). More than 50 of petitioner's 140 employees, including the 19 individuals here involved, walked out of the plants (R. 168–169; J.A. 84). Toward the end of the day, President Albritton addressed the employees who had not joined the strike. After thanking them for their loyalty to the Company in appearing for work, he advised them that, although the Union had a right to strike and to picket peacefully, it could not lawfully prevent employees from

entering the plant. He added that the plant would remain open under present working conditions and that, while absent employees would be given an opportunity to return to work, strikers who chose not to return would be permanently replaced (R. 169–171; J.A. 407–408).

During the first week of the strike, petitioner sent letters to the strikers notifying them that if they wished to return to work they must report by 7 a.m., June 20, 1960, and that, if they did not return by the designated time, they might be replaced by "one of the many applicants who would like to work" for the Company (R. 171–172; J.A. 482). One striker returned to work on June 20 (R. 172; J.A. 89, 93). The Company immediately began replacing the others. Each was notified, when his replacement was hired, that his services had been terminated (R. 172; J.A. 91, 483–484).[3] By Friday, July 22, all but two strikers had been replaced (R. 172; J.A. 89). On that date, the Union notified the strikers that it was withdrawing financial support for the strike, whereupon the strikers decided to discontinue the strike and the picketing (R. 172; J.A. 76–77).

The present case involves 19 strikers (hereafter the complainants) who applied for, but were denied, reemployment at the end of the strike. Nine of these complainants applied for work at various times dur-

[3] However, two strikers who returned before the end of the strike were reemployed even though replacements for them had been hired (R. 177; J.A. 93).

ing the month of August.[4] They were told that no jobs were available at that time, but some were assured that they would be called as soon as there was an opening (R. 181–184; J.A. 61, 151, 207, 220–221, 299).

The Company did not hire any more new permanent employees until early in October, 1960, when it passed over the strikers who had applied for jobs and hired five new applicants. On October 10, Personnel Manager Varner assembled the five newcomers, spoke to them on the subject of plant rules, and explained the operation of the insurance sharing programs. One of the employees asked about the strike, and a discussion of the Union followed. Varner told the newcomers that President Albritton had told the employees that he "wanted everybody to be one big family" and was not going to have a union in the plant; that 54 employees had gone out on strike and, though requested, they had refused to return to work; and that, as a result, all 54 had lost their jobs (R. 172–173; J.A. 362–365).

About the middle of October, Johnny Munoz, another of the 19 complainants, applied for reemployment and was told by Varner that no job was available at that time but that he would be notified if an opening occurred (R. 186–187; J.A. 194–196, 199–200). Five permanent production workers were hired between October 13 and October 27, 1960 (J.A. 485–487).

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[4] Faust, Brewster, Ramirez, Chambers, Burlin, Hines, Alvarado, Hurt, and Clanton, Jr. (R. 181–186; J.A. 59, 110; 181, 188, 207–208, 247, 254–255, 263–264, 298–299, 489, 490).

Late in March, 1961, the strikers learned that the Company was again hiring employees. The remainder of the 19 complainants, and some of those who had applied before, applied for work with the Company between the latter part of March, 1961, and May 15, 1961. They were told either that petitioner had a policy not to employ former employees (R. 184–191; J.A. 144–148, 265, 266, 352–354)[5] or that they would be called if there were any openings (R. 185–186, 190–193; J.A. 231–232, 240–241, 247–248, 266). The Company hired 86 new employees between November 15, 1960, and May 13, 1961, for jobs which the complainants were qualified to perform (R. 195; J.A. 485–487). None of the 19 complainants was hired for any of these jobs (R. 195).

[5] The Company's policy of not reemploying former employees was adopted in December, 1958, for the specific purpose of saving petitioner the cost of retraining an employee who was essentially a "job hopper" and who, having once quit petitioner's employment, could be expected to quit again (R. 174–175; J.A. 97, 421–423). The policy had never been published or otherwise communicated generally to the employees (R. 175; J.A. 97, 410–411). Prior to the termination of the strike, it had been applied with great flexibility. According to the testimony of Personnel Manager Varner (R. 176; J.A. 447–455, 471–481) and Production Scheduler Kilgore (R. 175–176; J.A. 425–434), 11 former employees had applied for reemployment between the adoption of the policy in December, 1958, and the strike in June, 1960. Of these, the Company had accepted six and had rejected five (J.A. 449–453; 471–479, 425–433). Moreover, during the strike, the Company offered reemployment to two former employees (J.A. 477–478), and reemployed two strikers who had abandoned the strike, even though they had been replaced (R. 177; J.A. 471–472).

B. THE BOARD'S DECISION AND ORDER

Upon the foregoing facts, the Board, affirming the Trial Examiner, found that the 19 complainants had made timely applications for reemployment, that these applications were intended by the strikers and were regarded by the Company as continuing applications, and that the Company had bypassed the complainants and hired new employees. The Board further found that the Company denied reemployment to the 19 complainants, not because of a policy against the hiring of former employees (as the Company contended), but because they had engaged in union and strike activity. Accordingly, it concluded that the Company's action constituted discrimination in violation of Section 8(a)(3) of the Act (R. 197–199, 248). The Board further concluded that, even if the Company's action were motivated by a policy of not rehiring former employees, the application of that policy to strikers constituted an unwarranted interference with strike activity, in violation of Section 8(a)(1) of the Act (R. 203–205).

The Board ordered the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with the exercise of employee rights guaranteed by Section 7 of the Act. The Board ordered the Company to offer the complainants immediate employment, to make them whole for any losses suffered as a result of the discrimination against them and to post appropriate notices (R. 221–225, 249–250).[6]

[6] In addition to the 19 strikers discussed above, the Board also found a discriminatory refusal to reemploy two other

C. THE COURT OF APPEALS DECISION

The court of appeals concluded that substantial evidence supported the Board's finding that the Company refused to rehire the 19 complainants because they had participated in the strike and that the Company's purported application of its policy not to rehire former employees "was a pretext for unlawful discrimination" (Pet. 5a–6a). The court accordingly enforced the Board's order insofar as it remedied that discrimination (Pet. 8a).

ARGUMENT

1. The court of appeals accepted the Board's finding that petitioner's job-hopping rule was utilized only as a pretext for refusing to reemploy the 19 complainants because of their strike activity. Such a refusal to hire constitutes discrimination in violation of Section 8(a)(3) of the Act (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177). The only question presented, therefore, is whether substantial evidence supports the Board's finding that the Company had a discriminatory motive. This evidentiary issue, once carefully reviewed by the court of appeals (Pet. 5a–6a), does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.[1]

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strikers, Espinoza and Ruiz (R. 210–213, 248, n. 1). The court of appeals set aside the Board's findings with respect to these two strikers on the ground that there was insufficient evidence that they had applied for reemployment (Pet. 4a) and no issue respecting them is now presented.

[1] Petitioner erroneously contends (Pet. 16–17) that the court of appeals broadly held that a rule against job-hopping may

2. There is no substance to petitioner's contention that the complaint—insofar as it pertained to strikers Alvarado, Ramirez, Faust, and Munoz—was barred by Section 10(b) of the Act (Pet. 17–18). Although these employees first applied for work more than six months before they filed unfair labor practice charges with the Board,[4] the record establishes, as the court below concluded (Pet. 7a), that the applications "were regarded by both the applicants and the Company as *continuing* applications." Accordingly, the Company committed a separate unfair labor practice each time it hired a new employee in preference to one of the complainants. *National Labor Relations Board* v. *Textile Machine Works*, 214 F. 2d 929, 932 (C.A. 3); *National Labor Relations Board* v. *Plumbers and Pipe Fitters Local Union 214*, 298 F. 2d 427, 428 (C.A. 7); and see *Local Lodge No. 1424, IAM* v. *National Labor Relations Board*, 362 U.S. 411, 416. Vacancies which these four complainants were qualified to fill occurred within the six-month periods preceding the service of charges on their behalf (R. 214). *National Labor Relations Board* v. *Pennwoven, Inc.*, 194 F. 2d 521 (C.A. 3) and *National Labor Relations Board* v. *Childs Co.*, 195 F. 2d 617 (C.A. 2), relied on by petitioner (Pet. 17–18), did not involve such

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not be applied against "replaced strikers." The court stated, however, that "a rule against job-hopping is not in itself unlawful * * *" (Pet. 6a).

[4] Alvarado and Ramirez filed charges on May 12 and 22, 1961, respectively (R. 10, 46), Faust filed a charge on October 27, 1961 (R. 120), and Munoz filed one on November 30, 1961 (R. 137).

separate and independent unlawful acts occurring within the 10(b) period. See the discussion of *Pennwoven* in *Textile Machine Works, supra*, 214 F. 2d at 932.

3. There is similarly no merit to petitioner's contention (Pet. 13–15) that the complaint was improperly issued because the charging parties did not appeal the Regional Director's refusal to issue a complaint within the period specified in the Board's Rules. Although Section 102.19 of the Board's Rules and Regulations (Pet. 23a) prescribes a period of 10 days within which to file such an appeal, there is nothing in the Rules, or in the Act, which precludes the General Counsel, as he did here, from granting an extension of time where necessary to promote the ends of justice or to effectuate the purposes of the Act.[9] As observed by the court of appeals (Pet. 8a), quoting with approval from *National Labor Relations Board* v. *Monsanto Chemical Co.*, 205 F. 2d 763 (C.A. 8), "It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice re-

[9] On June 26, 1961, the Regional Director notified the parties that he was refusing to issue a complaint, that an appeal might be taken to the General Counsel under Section 102.19 of the Board's rules, and that upon good cause the General Counsel might grant an extension of time in which to file an appeal. On July 7, the complainants requested an extension, it was granted, and an appeal was filed within the extension allowed. Thereafter, the General Counsel reversed the Regional Director in substantial part and issued a complaint (Pet. 7a–8a).

quire it."[10] *National Labor Relations* v. *United Brotherhood of Carpenters*, 261 F. 2d 166 (C.A. 7), relied on by petitioner (Pet. 15), concerned whether Section 10(k) of the Act and the Board's rules issued thereunder required the Board to decide jurisdictional disputes on their merits and to make an affirmative award of the disputed work. The decision did not touch upon the power of the Board to relax its own time requirements in proceedings before it.[11]

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[10] Section 102.121 of the Board's Rules (29 C.F.R. § 102.121) specifically provides that the Rules "shall be liberally construed to effectuate the purposes and provisions of the act."

[11] Equally insubstantial is petitioner's final contention (Pet. 19) that, since no exceptions were filed by the General Counsel or the charging party to the remedy proposed by the Trial Examiner, the Board lacked power to enlarge that remedy. It is clear that where a party, as did petitioner, files exceptions to parts of a Trial Examiner's decision, the Board has power to review parts of the decision to which no exception was filed, if this would serve the ends of justice or effectuate the policies of the Act. *National Labor Relations Board* v. *WTVJ, Inc.*, 268 F. 2d 346, 348 (C.A. 5); *National Labor Relations Board* v. *Sapulpa Typographical Union No. 619, ITU*, 321 F. 2d 771 (C.A. 10); cf. *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 384 (C.A. 9), certiorari denied, 341 U.S. 909. By requiring petitioner to offer the complainants not only immediate employment, as recommended by the Trial Examiner, but also the seniority and other benefits they would have enjoyed absent the discrimination against them (R. 249, n. 2), the Board simply acted more completely to "undo the effects of [petitioner's] discrimination." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 189.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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